



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Good Food Service, Inc.

File: B-253161

Date: August 19, 1993

Pamela J. Mazza, Esq., Piliero, Mazza & Pargament, for the protester.

Matthew S. Perlman, Esq., Arent Fox Kintner Plotkin & Kahn, for Marriott Management Services Corp., an interested party.
Jack R. Cordes, Jr., Esq., Department of Justice, for the agency.

David R. Kohler, Esq., and Audrey H. Liebross, Esq., for the Small Business Administration.

Paula A. Williams, Esq., Daniel I. Gordon, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The set-aside provisions of the Federal Acquisition Regulation do not apply to procurement of concession services because expenditure of appropriated funds would not be involved; while the Small Business Act requires that agencies establish goals to assist in satisfying the requirement that a fair proportion of government contracts are awarded to small businesses, there is no requirement that an agency consider whether or not to set aside a particular concession service procurement.

DECISION

Good Food Service, Inc., a small business, protests the issuance of request for proposals (RFP) No. 6255 by the Federal Bureau of Investigation (FBI), Department of Justice as an unrestricted procurement. The solicitation is for a contractor to establish and operate as a concessionaire, under its own name, cafeteria food and vending service facilities at the FBI headquarters building. Good Food asserts that the agency failed to comply with the

requirements of the Federal Acquisition Regulation (FAR) by not setting the procurement aside for exclusive small business participation.

We deny the protest.

The FBI commenced procedures to obtain concession services at its headquarters pursuant to a delegation of procurement authority issued by the General Services Administration (GSA). After it began the procurement action, the FBI sought guidance from GSA because the contracting officer was concerned that the requirements of the Randolph-Sheppard Act, 20 U.S.C. § 107 (1988)--which gives priority to state licensing agencies to submit offers on behalf of blind licensees--could conflict with the provisions of the Small Business Act, 15 U.S.C. § 631 et seq. (1988 and Supp. IV 1992), and the set-aside provisions in FAR § 19.5, which implement the Small Business Act. GSA advised the agency that the set-aside requirements contained in FAR § 19.5 are inapplicable because concession contracts do not involve the expenditure of appropriated funds. Further, GSA took the position that if negotiations with the state licensing agency were unsuccessful, the procurement could be pursued on the basis of full and open competition. Based on GSA's response, the contracting officer did not obtain a small business set-aside review from the Small Business Administration (SBA) procurement center liaison.

The contracting officer gave the District of Columbia licensing agency an opportunity to submit a proposal, but the agency declined to do so. Thereafter, the agency synopsisized its requirements in the Commerce Business Daily, and on December 18, 1992, issued the subject solicitation on an unrestricted basis.

Good Food alleges that the FBI violated the FAR requirement that procurements be set aside for small business competition where there is a reasonable expectation that offers will be received from at least two responsible small business concerns and award will be made at a fair market price. Good Food contends that at least two small businesses would submit offers because the mailing list for this acquisition identified a number of small business concerns, including itself, which had expressed interest in the acquisition. Therefore, Good Food argues, the solicitation should have been set aside for small business concerns.

The FBI responds that its concession requirements do not constitute an "acquisition" for purposes of the FAR. By its own terms, the FAR applies only to "acquisitions" defined as

"the acquiring by contract with appropriated funds of supplies and services (including construction) by and for the use of the Federal government" FAR §§ 1.103 and 2.101. The FBI takes the position that since this procurement involves no expenditure of appropriated funds, it is not an "acquisition" within the meaning of the FAR and the FAR's set-aside requirements therefore do not apply.

In its comments on the agency report, Good Food argues that FAR § 19.502 does apply because the procurement actually uses appropriated funds. The protester asserts that the FBI, through its delegated authority from GSA, is authorized by statute to collect revenues from the concessionaire and the use of these funds is also specified.¹ See Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 490 (1988). Thus, Good Food maintains, the authorization constitutes an appropriation and the acquisition is subject to the FAR. In addition, the protester alleges that performance of the concession contract will involve use of appropriated funds to provide, for example, government-furnished equipment and facilities, as well as contract administration and termination costs. Even if procurements that use non-appropriated funds are otherwise exempt from the FAR, the protester insists that the Small Business Act mandates use of the set-aside provisions to achieve the purpose of the Act.

SBA, in a report filed at our request, supports Good Food's position. In SBA's view, the provisions of FAR § 19.5 were issued to implement the Small Business Act requirement that a "fair proportion" of government contracts be placed with small business concerns. 15 U.S.C. § 644(a). Since the Act contains no exception for contracts using non-appropriated funds, SBA states that concession contracts fall within its scope and the FBI is bound to follow the small business set-aside provisions in the FAR even if no appropriated funds will be used.

The Small Business Act states that:

"small-business concerns . . . shall receive any award or contract . . . as to which it is determined by the [SBA] and the contracting [agency] to be in the interest of assuring that a

¹Under the terms of the solicitation, the FBI will collect 2 percent of gross cafeteria sales and 2 percent of net vending sales from the concessionaire.

fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns" 15 U.S.C. § 644(a) .

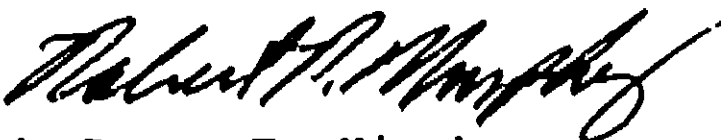
The Act does not explicitly mandate set-asides for small business concerns; the only way in which the Act requires specific action to ensure that small business concerns receive a "fair proportion" of government procurement contracts is through the requirement that both government-wide and agency-specific goals be established for the participation of small business concerns in such contracts. 15 U.S.C. § 644(g) .

The FAR implements the statutory mandate that a "fair proportion" of contracts be awarded to small business concerns by requiring that procurements be set aside for those concerns when specified conditions are satisfied. FAR Subpart 15.9. See J.H. Rutter Rex Mfg. Co., Inc. v. United States, 706 F.2d 702 (5th Cir.), cert. denied, 464 U.S. 1008 (1983). As the FBI correctly contends, however, the FAR set-aside requirements apply only to procurements requiring the expenditure of appropriated funds. In arguing that the FAR is applicable, the protester mistakenly relies on the principle that, where Congress has authorized the collection of funds by an agency and has specified the purposes for which those funds may be used, the purchase of goods and services with those funds is considered an expenditure of appropriated funds. See, e.g., International Line Builders, 67 Comp. Gen. 8 (1987), 87-2 CPD ¶ 345 (agency's expenditure of funds generated by rate-payers held to constitute expenditure of appropriated funds). The acquisition here is not being paid for with funds the FBI collects from the concessionaire or with other funds available to the agency, so the line of decisions relied on by the protester is inapposite. Also, the contractor's possible incidental use during performance of government facilities or equipment does not, in our view, convert the acquisition into one accomplished with appropriated funds. Accordingly, because the procurement does not entail the agency's expenditure of funds, it does not involve the expenditure of appropriated funds and the FAR set-aside provisions do not apply.

The only remaining issue is whether, apart from the requirements of the FAR, the Small Business Act mandates that a "fair proportion" of procurements be awarded to small business concerns creates a separate, additional requirement compelling the FBI to consider setting this procurement

aside for such concerns. We find that it does not.² The statutory language is general, leaving the implementation of Congress' broad delegation of procurement authority to the regulations--in this case, the FAR.³ See J.H. Rutter Rex Mfg. Co., Inc., 706 F.2d at 706. Accordingly, the Act provides no further requirement in this regard other than that established by the FAR which, as explained above, does not require that this procurement be considered as a potential small business set-aside.

The protest is denied.


James F. Hinchman
General Counsel

²As noted above, the Act requires that government-wide and agency-specific goals be established for award of contracts to small businesses. The agency goals are established by the contracting agencies after consultation with SBA. The FBI has such goals in place.

³Section 639(d) of the statute suggests that the "fair proportion" language does not apply to contracts which do not involve appropriated funds. That provision states as follows:

"For the purpose of aiding in carrying out the national policy to insure that a fair proportion of the total purchases and contracts for property and services for the Government be placed with small-business enterprises, . . . the Department of Defense shall make an annual report . . . showing the amount of funds appropriated to the Department of Defense which have been expended, obligated, or contracted to be spent with small business concerns" (Emphasis added.)

This language indicates that the "fair proportion" criterion relates solely to appropriated funds, since it measures that proportion in terms of expenditure of appropriated funds alone. While this particular provision relates to the Department of Defense, thus reflecting particular Congressional concern that the agency comply with the Act's policies favoring small businesses, see J.H. Rutter Rex Mfg. Co., Inc., 706 F.2d at 705, the statute provides no basis to construe the "fair proportion" language differently for civilian agencies such as the FBI.